No. 01-679

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In the

Supreme Court of the United States

GONZAGA UNIVERSITY AND ROBERTA S. LEAGUE,
Petitioners,

v.

JOHN DOE,
Respondent.

On Writ of Certiorari
To the Supreme Court of the State of Washington

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, DELAWARE, FLORIDA, HAWAII, MARYLAND, MISSISSIPPI, NEBRASKA, NEVADA, NEW JERSEY, OHIO, OREGON, UTAH, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an individual may maintain an action for damages under 42 U.S.C. §1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. §1232g, a Spending Clause statute that prohibits recipients of federal funds from having a policy or practice of releasing educational records to unauthorized persons.

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INTEREST OF THE AMICI CURIAE

This case addresses the extent to which 42 U.S.C. §1983 may be used to vindicate rights allegedly secured under conditional funding statutes enacted pursuant to Congress's spending power, and in particular whether §1983 may be used to vindicate rights allegedly created by FERPA. The States have a strong interest in the resolution of both the general and particular issues. States, state agencies, and state officials participate in hundreds of cooperative state-federal programs developed by Congress under its Spending Clause power. In addition, States are bound to observe FERPA's requirements to the extent they receive federal funding in connection with their operation of public universities and other schools.

SUMMARY OF ARGUMENT

1. The question in this case is whether FERPA may be enforced through 42 U.S.C. §1983, which provides a cause of action against anyone who, acting under color of state law, causes deprivations of "rights . . . secured by the Constitution and laws." The answer is no. Conditional funding statutes like FERPA do not "secure" rights and are not "laws" within the meaning of §1983. Instead, statutes enacted pursuant to the Spending Clause (U.S. Const. art. I, §8, cl. 1) merely set forth conditions that prospective recipients must abide by if they choose to accept federal funds. If funds are accepted, the attached conditions become legally binding as a matter of basic contract law. But it is the resulting contract between the government and the funds recipient, not the statute describing the conditions attached to funds, that creates and secures rights for third-party beneficiaries. Because contracts

of this sort are not "laws" within the meaning of §1983, they cannot be enforced through that provision.

2. Even if conditional funding statutes are "laws" within the meaning of §1983, actions under that provision should not be available to enforce those funding statutes, including FERPA, that create administrative enforcement mechanisms but do not create private rights of action. With respect to statutes of this sort, Congress obviously believes that the administrative mechanism is a sufficient vehicle for policing compliance with funding conditions on the part of *private* recipients. There is no reason to suspect that Congress has the precise opposite belief with respect to *public* fund recipients, and therefore intends to subject those recipients to enforcement actions brought under §1983. Instead, the presumption should be that Congress intends to treat private and public fund recipients equally. Conditional funding statutes like FERPA are, after all, contractual in nature, and they create the same contract between the federal government and every entity that accepts federal funds, whether public or private.

Accordingly, unless Congress *expressly* authorizes §1983 actions against public fund recipients to enforce conditional funding statutes, the Court should presume that Congress intends for administrative mechanisms to be sufficient and exclusive enforcement vehicles, just as they are with respect to private fund recipients. And because FERPA contains no express language authorizing §1983 enforcement actions, the Court should conclude that such actions cannot go forward.

ARGUMENT

I. Statutes That Create Conditional Funding Programs Are Not "Laws" Within The Meaning Of 42 U.S.C. §1983.

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that the phrase "and laws" as used in 42 U.S.C. §1983 "means what it says," so that §1983 "broadly encompasses violations of federal statutory . . . law." Since *Thiboutot*, this Court has proceeded on the view that conditional funding statutes enacted pursuant to Congress's spending power may secure rights enforceable under §1983. *See, e.g., Blessing v. Freestone*, 520 U.S. 329, 340-48 (1997); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 501 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 419 (1987); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 29 n.12 (1982). This view bears reexamination.

Although *Thiboutot*'s main point—that "and laws" embraces statutory as well as constitutional rights—may be sound, it does not follow that all congressional enactments are "laws" in the sense contemplated by §1983. To the Reconstruction-era Congress, "laws" meant the general run of statutes that compel or forbid conduct, regulate relationships, and otherwise create rights and duties. Conditional funding statutes enacted pursuant to the Spending Clause do none of these things. Unlike most federal enactments, conditional funding statutes have no obligatory force; they only set forth conditions that become obligatory as a matter of contract law once a prospective recipient accepts federal funds. Consequently, conditional

funding statutes like FERPA are not "laws" that "secure rights" within the meaning of 42 U.S.C. §1983.[1] Because *Thiboutot* and its progeny have not accounted for the unique nature of conditional funding statutes, the Court should consider the matter anew and hold that such statutes may not be enforced in actions brought under §1983.

A. The 43rd Congress Used "Laws" In 42 U.S.C. §1983 In Its "Generic Sense," To Mean Legally Binding Precepts Issued By A Sovereign.

Section 1 of the Civil Rights Act of 1871 imposed liability on anyone who deprived a person of rights "secured by the Constitution of the United States." 17 Stat. 13. In 1874, the 43rd Congress amended the statute, which was later codified at 42 U.S.C. §1983, to protect rights secured by "the Constitution *and laws*." In *Thiboutot* the Court construed this amendment broadly to embrace all federal statutes. 448 U.S. at 4. But even if a broad construction of the amendment is warranted, the 43rd Congress did not intend to expand §1983's coverage to include rights secured through Spending Clause legislation.

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[1] It is beyond dispute that Congress enacted FERPA pursuant to its power to spend for the general welfare. *See United States v. Miami Univ.*, 91 F. Supp. 2d 1132 (S.D. Ohio 2000); *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1172 (3d Cir. 1997); *see also* Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 Am. U. L. Rev. 1, 5 (2001).

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). If the statute's text and structure are clear, then the interpretative task is at an end, *Alexander v. Sandoval*, 532 U.S. 275, 288 & n.7 (2001), but if the statute's language is ambiguous, then "we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent." *National Sea Clammers*, 453 U.S. at 13. When construing §1983 in particular, the Court presumes that the Reconstruction-era Congress was familiar with the common law, and therefore attempts to read the statute to comport with common law principles absent evidence that Congress intended to depart from them. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 67 (1989); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

The phrase "and laws" as used in 42 U.S.C. §1983 does not plainly include or exclude conditional funding legislation enacted pursuant to the Spending Clause. In addition, "not a single shred of evidence in the legislative history" explains why Congress added this phrase to the statute. *Thiboutot*, 448 U.S. at 14 (Powell, J., dissenting). Yet Congress obviously intended "and laws" to refer to *some* category of statutes; even the dissenting justices in *Thiboutot* agreed that the phrase encompassed the equal rights legislation contained in the Civil Rights Acts of 1866 and 1870. *Id.* at 19 n.6 (Powell, J., dissenting). Because §1983 contains no language modifying "and laws," the *Thiboutot* majority took the view that the

phrase warranted a broad construction, and thus concluded that all federal statutes, not just equal rights legislation, fall within its ambit. 448 U.S. at 4.

But if the *Thiboutot* Court was correct that "laws" was intended to have a broad meaning, then the 43rd Congress most likely used the term in its "generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force; including . . . statutes." *United States Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37 (1930). This "generic sense" of the term would have been commonly accepted in 1874. *See, e.g.*, Fortunatus Dwarris, *A General Treatise on Statutes* 38 (1871) (defining "statutes" as encompassing "those rules of conduct which are introduced by the lawmaking power in an express and positive form; which control the particular cases and circumstances to which they relate or describe"); 2 *Burrill's Law Dictionary* 132 (2d ed. 1867) (defining "law" as "a rule of civic conduct, prescribed by the supreme power in a state").

Applying this conception of "laws" to §1983 cannot be objectionable, because it comports with the *Thiboutot* Court's understanding that the term requires a broad reading. It encompasses, for example, the Civil Rights Acts of 1866 and 1870, as well as the National Labor Relations Act, *see Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994) (NLRA secures rights enforceable under 42 U.S.C. §1983); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109 (1989) (same). Indeed, most statutes enacted by Congress prescribe rules of action or conduct and have binding legal force as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2; *McCulloch v.*

Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819), and are therefore "laws" as the 43rd Congress would have understood that term.

There is no evidence to support the view, however, that the 43rd Congress intended "and laws" as used in §1983 to extend beyond the broad, generic sense described above. *See Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992) (Court assumes that "ordinary meaning of [statutory] language accurately expresses the legislative purpose" (internal quotations and citation omitted)). The question, then, is whether conditional funding programs enacted pursuant to the Spending Clause are "laws" within this generic sense. As the following section shows, the answer is no.

B. Spending Clause Statutes Merely Set Forth Contractual Terms That Prospective Funding Recipients Are Free To Accept Or Reject And Therefore Are Not "Laws" That Have Legally Binding Force.

Conditional funding statutes enacted pursuant to the Spending Clause are not laws in the "generic sense" described above. Unlike most federal laws, conditional funding statutes do not prescribe rules of action or conduct and have no legal force. Instead, they merely spell out the conditions that prospective fund recipients must abide by *if* they agree to accept funds. Therefore, they are not "laws" which may be enforced through actions brought under 42 U.S.C. §1983.

As this Court has repeatedly explained, conditional funding programs enacted pursuant to the Spending Clause are contractual in nature: in return for federal funds, the recipient (whether a State or private entity) agrees to abide by conditions imposed by the federal government. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Suter v. Artist M.*, 503 U.S. 347, 356 (1992); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).[2] Prospective fund recipients may, if they so choose, decline federal funds if the attached conditions are objectionable, *see, e.g., South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987); *Pennhurst*, 451 U.S. at 11; *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947); *Massachusetts v. Mellon*, 262 U.S. 447, 480 (1923), and in such instances the conditions will not be enforced, *see New York v. United States*, 505 U.S. 144, 167-68 (1992); *Grove City College v. Bell*, 465 U.S. 555, 575 (1984). The acceptance of the funds is thus a voluntary choice, and the conditions accompanying the funds become obligatory only when that choice is made. *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *cf. United States Dep't of Trans. v. Paralyzed Veterans of America*, 477 U.S. 597, 605 (1986) (through section 504 of the Rehabilitation Act of

[2] The Comptroller General has long taken the view that "the acceptance of a grant of Federal funds which is not unconditional but is subject to conditions which must be met by the grantee creates a valid contract between the United States and the grantee." 50 Comp. Gen. 470 (1970).

1973, Congress "enters into an arrangement in the nature of a contract with the recipient of the funds; the recipient's acceptance of the funds triggers coverage under the [Rehabilitation Act]").

Given the contractual nature of conditional funding programs, it is plain enough that legislation creating such programs cannot be equated with "law" in its "generic sense, as meaning the rules of action or conduct duly prescribed by controlling authority, and having binding legal force." *Guenther*, 281 U.S. at 37. Although conditional funding statutes are "laws" in the sense of being congressional enactments, they do not secure rights or impose duties and may be ignored or rejected without sanction. Thus, if Congress seeks to advance a federal policy through a conditional funding program enacted pursuant to its spending power, States or private parties can effectively thwart that policy by declining to participate in the program. *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. at 143-44, is an illustration; there Oklahoma thwarted federal policy by adopting the "simple expedient" of refusing to comply with the Hatch Act. This is a far cry from the typical federal statute, which, so long as it respects constitutional limits, must be obeyed as the "supreme Law of the Land," U.S. Const. art. VI, cl. 2. *See Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 561-62 (E.D. Mich. 2001) (Spending Clause legislation does not fall within the Supremacy Clause); *United States v. Morgan*, 230 F.3d 1067, 1073 (8th Cir. 2000) (Bye, J., concurring) ("Congress may indirectly regulate state conduct by attaching 'strings' to grants of money given to state and local governments, but those strings aren't *laws*." (emphasis in original) (citation omitted)), *cert. denied*, 122 S. Ct.

62 (2001).[3] In short, a statute that has no obligatory force can hardly be deemed a "law" in the sense contemplated by the 43rd Congress.

To be sure, conditions attached to federal funds are legally enforceable once a State or other entity accepts those funds. But the obligation arises as a matter of contract law, not as a matter of legislative decree. *See United States v. Marion County Sch. Dist.*, 625 F.2d 607, 609-11 (5th Cir. 1980) (United States may bring contract action to compel fund recipients to comply with federal funding conditions). As one commentator has explained: "What makes [federal funding] conditions obligatory is [their] essence as contract, wholly apart from the circumstance that they happen to be spelled out in a statute or an agency rule. Although articulated in a statute or rule, they have no force as 'law'; their force is only contractual." David E. Engdahl, *The Spending Power*, 44 Duke L. J. 1, 71 (1994).

The same reasoning applies to third-party rights "secured" under conditional funding programs. Rights

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[3] Outside the §1983 context, this Court has held that, once a recipient has accepted federal funds, the conditions attached to those funds trump contrary state laws by virtue of the Supremacy Clause. *See, e.g., Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 258 (1985); *Townsend v. Swank*, 404 U.S. 282, 285 (1971). These decisions do not, however, account for the contractual nature of Spending Clause programs, a point Chief Justice Burger observed in *Townsend*: "Congress has used the 'power of the purse' to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV [of the Social Security Act] is no way mandatory upon the States under the Supremacy Clause." 404 U.S. at 292 (Burger, C.J., concurring).

of this nature arise by virtue of the fund recipient's contractual agreement to accept the conditions attached to the funds, not by virtue of any statutory enactment. Indeed, if prospective recipients decline funds offered under a federal spending program, then the rights contemplated by the statute creating the program do not come into existence. It follows that rights "secured" under conditional funding programs are secured by the common law of contract, not by any statutory law. And it has never been suggested that "and laws" as used in 42 U.S.C. §1983 should be construed to include the common law of contract.

The 43rd Congress would have understood that Spending Clause legislation derives its obligatory force from principles of contract law. In *McGee v. Mathis*, 71 U.S. (4 Wall.) 143 (1866), the Court discussed the legal obligations arising from an 1850 statute through which the United States granted lands to Arkansas on the condition that steps would be taken to cultivate them. The Court stated:

> It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract [are] met in the transaction, — competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the [Contract Clause of the] Constitution.

71 U.S. (4 Wall.) at 155. Congress's power to dispose of lands derives not from the Spending Clause but from

the Property Clause, U.S. Const. art. IV, §3, cl. 2, but *Mathis* illustrates the general principle that legislative acts granting benefits to States with conditions attached are, once accepted, binding on the States as a matter of contract law. The 43rd Congress was presumably aware of this principle, and would have expected the "and laws" language contained in 42 U.S.C. §1983 to be construed with it in mind. *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("we presume that Congress expects its statutes to be read in conformity with this Court's precedents"). Therefore, this Court should conclude that the 43rd Congress did not intend for conditional funding statutes enacted pursuant to the Spending Clause to be considered "laws" within the meaning of §1983.

C. The 43rd Congress Would Not Have Intended The "Tort Liability Created By §1983" To Be Used To Remedy Contractual Breaches Occasioned By States' Failure To Comply With Federal Funding Conditions.

Additional evidence that the 43rd Congress did not intend §1983 to be used as an enforcement vehicle for conditional spending programs may be gleaned from considering how far such a remedy would have departed from common law principles in 1874. If, as this Court has insisted, conditional funding programs are contractual in nature, *Pennhurst*, 451 U.S. at 17, it follows that violations of the conditions attached to federal funds are contractual breaches. Providing a remedy for such breaches through the "tort liability created by §1983," *Fact Concerts*, 453 U.S. at 258,

would have been a significant and surprising innovation in the late 19th century. Because there is no evidence that Congress intended this innovation, this Court should hold that §1983 cannot be used to enforce rights secured through conditional funding programs.

When a §1983 damages suit is brought to vindicate alleged rights under a conditional funding program, the plaintiff is typically not a party to the contract but instead is a third-party beneficiary. *See Blessing*, 520 U.S. at 349-50 (Scalia, J., concurring). In addition, the action is not directed against the State that entered into the contract—the State is not a "person" amenable to suit under 42 U.S.C. §1983, *Will*, 491 U.S. at 64—but instead is directed against a non-party to the contract (i.e., a public official in his individual capacity who acts as an agent of the State). *See Wright*, 479 U.S. at 423 ("*Maine v. Thiboutot* held that §1983 was available to enforce violations of federal statutes by agents of the State." (citation omitted)). Therefore, the typical §1983 action to enforce Spending Clause legislation may fairly be described as one non-party to a contract suing another non-party for a contractual breach under what is essentially a tort statute.[4]

It is highly unlikely that the 43rd Congress would have intended such an odd remedial scheme. As Justice Scalia pointed out in his concurring opinion in *Blessing*, the general rule in 1874 appears to have been

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[4] Section 1983 "creates a species of tort liability" and damages under the statute are "ordinarily determined according to principles derived from the common law of torts." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986) (internal quotations and citations omitted)).

that third-party beneficiaries were not permitted to sue on contracts. 520 U.S. at 349-50. Another general rule at that time was that agents were not liable for breaches of contracts they executed or performed on behalf of their principals. *See, e.g., Abeles v. Cochran*, 22 Kan. 405, 414 (1879) (Brewer, J.); *Ogden v. Raymond*, 22 Conn. 379, 384 (1853); *Simonds v. Heard*, 40 Mass. (23 Pick.) 120, 124 (1839); Joseph Story, *Commentaries on the Law of Agency* §261 (8th ed. 1874); 1 William W. Story, *A Treatise on the Law of Contracts* §247 (5th ed. 1874); William Paley, *A Treatise on the Law of Principal & Agent* 368 (4th ed. 1856).

This was especially true in the case of public officials. *See, e.g., Garland v. Davis*, 45 U.S. (4 How.) 131, 148 (1846) ("public agents are not usually liable on mere contracts or promises made in behalf of their principals"); *City of Providence v. Miller*, 11 R.I. 272, 277 (1876); *McCurdy v. Rogers*, 21 Wis. 197, 202-03 (1866). As Chief Justice Marshall explained in *Hodgson v. Dexter*, 5 U.S. (1 Cranch) 345, 363-64 (1803): "A contrary doctrine would be productive of the most injurious consequences to the public, as well as to individuals. The government is incapable of acting otherwise than by its agents, and no prudent man would consent to become a public agent, if he should be made personally responsible for contracts on the public account."

Had Congress intended to cast aside these settled and sensible rules in the case of contractual obligations arising out of Spending Clause programs, it would have done so in unmistakable terms, not by simply adding the phrase "and laws" to section 1 of the Civil

Rights Act of 1871. There is nothing to suggest, moreover, that the 43rd Congress saw a need to upset the prevailing common law rules. By 1874 it was established that the United States could sue to enforce its own contracts, *see United States v. Tingey*, 30 U.S. (5 Peters) 115, 128 (1831); *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181 (1818); *Marion County Sch. Dist.*, 625 F.2d at 611, so it was not as if the States were (or are today) free to disregard their obligations under conditional funding programs. *Cf. Pennhurst*, 451 U.S. at 28 ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").[5] Therefore, one cannot conclude that Congress meant "and laws" as used in 42 U.S.C. §1983 to create a supplemental remedy for third-party beneficiaries against agents of the States without ignoring the legal landscape as it existed in 1874.

In sum, the available evidence points to the conclusion that Congress did not intend for "and laws" as used in §1983 to include Spending Clause statutes. Therefore, because FERPA is undoubtedly a Spending Clause statute, this Court should hold that the plaintiff was not entitled to maintain a §1983 action against Gonzaga University to enforce FERPA, and should reverse the Supreme Court of Washington's judgment to the contrary.

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[5] Contract actions by the United States against individual States raise no difficulties under the Eleventh Amendment. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 (1999).

II. 42 U.S.C. §1983 Should Not Be Available To Enforce Conditional Funding Statutes That Do Not Give Rise To Private Causes Of Action And Instead Create Administrative Enforcement Mechanisms.

Even if conditional funding statutes are construed as "laws" that "secure rights" within the meaning of 42 U.S.C. §1983, remedies under that provision should nonetheless be foreclosed where, as with FERPA, the funding statute in question does not give rise to a private cause of action but instead creates an administrative process to enforce compliance. There is no basis for concluding that Congress believes, as a general matter, that administrative remedies are sufficient to ensure compliance with funding statutes by *private* fund recipients, but are inadequate with respect to *public* fund recipients. Therefore, the presumption should be that, where a conditional funding statute creates an administrative enforcement mechanism but not a private right of action, §1983 actions may not be brought against public fund recipients absent a clear statement by Congress to the contrary. Such a presumption would respect congressional intent and would be consistent with the contractual nature of conditional funding programs.

1. Under the Court's current jurisprudence, the question whether §1983 is available to enforce statutes —conditional funding statutes or otherwise—turns first on whether the relevant provision of the statute creates an enforceable right. *Blessing*, 520 U.S. at 340-41. If the provision is found to create a right, then a rebuttable presumption arises that the right is enforceable through §1983. *Id.* at 341. The

presumption may be rebutted upon a showing that Congress "specifically foreclosed a remedy under §1983," either expressly or by "creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Id.* (internal quotations and citations omitted). The State has the burden of making the "difficult showing" that an enforcement scheme in a funding statute forecloses a §1983 remedy. *Blessing*, 520 U.S. at 346; *see also Wright*, 479 U.S. at 423-24 ("'We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy' for the deprivation of a federally secured right." (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)).

The rule that a §1983 remedy is presumptively available whenever a statute is found to create rights stems from the canon that implied repeals of statutes are disfavored. *See Victorian v. Miller*, 813 F.2d 718, 721 (5th Cir. 1987); *Samuels v. District of Columbia*, 770 F.2d 184, 194 n.7 (D.C. Cir. 1985); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394, 419-25 (1982); *see generally Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978) (explaining canon). That is, given that Congress has expressly provided a cause of action whenever a state actor deprives a person of rights secured by federal laws, 42 U.S.C. §1983, the courts are reluctant to foreclose that cause of action in the absence of clear evidence that Congress so intended. As a result, the courts presume the availability of a §1983 remedy, and place the burden on the States to produce evidence that Congress intended to foreclose that avenue of relief.

2. Although the presumption favoring §1983 remedies may be justified in most instances where a statute creates enforceable rights, it should not be indulged with respect to those conditional funding statutes, like FERPA, which do not give rise to private causes of action and instead create an administrative enforcement scheme. The question whether a statutory right should be enforceable through a §1983 action (or any other remedy) is at bottom a question of congressional intent. *See Sandoval*, 532 U.S. at 286; *Blessing*, 520 U.S. at 341. As the example of FERPA shows, a faithful inquiry into congressional intent will rarely reveal any reason to believe that Congress intended to subject public recipients, and only public recipients, to private suit to enforce funding conditions.

In FERPA, Congress expressed only one specific remedial intention: the creation of an administrative enforcement scheme applicable to all recipients of funds. In 20 U.S.C. §1232g(f), Congress generally authorized the Secretary of Education to "deal with violations of this section." And Congress more specifically required the Secretary to "establish or designate an office and review board" for investigating and adjudicating violations of FERPA, and permitted parents and eligible students to file written complaints with that board. 20 U.S.C. §1232g(g).[6] We also know,

[6] For an explanation of this administrative enforcement scheme, see Daggett & Huefner, *supra* n.1, at 11. In addition to the administrative scheme, at least one court has held that the federal government may sue fund recipients to enforce compliance with FERPA. *See Miami Univ.*, 91 F. Supp. 2d at 1140. There is no question, then, that remedies exist to ensure that fund recipients honor FERPA's commitment to educational privacy.

based on Congress's silence and other indicia of legislative intent, that Congress did not intend to create a separate private right of action directly under FERPA itself.[7]

Nothing in FERPA's language or legislative history even hints that Congress believed the administrative scheme was insufficient as to public entities, or that public recipients of funds needed to be treated differently from private recipients. And as a matter of public policy, it is difficult to understand why Congress would have wanted an individual allegedly harmed by a university's policy or practice with respect to the release of private information to be able to sue Pennsylvania State University (for example), but not the University of Pennsylvania.

This evidence of congressional intent—which strongly suggests that Congress did not intend to permit private §1983 actions—far outweighs the canon against implied repeals, which, like all canons of statutory construction, can be "overcome" by "other circumstances evidencing congressional intent." *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). Indeed, it is supported by another canon of

[7] The state and federal courts have uniformly held that FERPA does not create a private right of action. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Girardier v. Webster College*, 563 F.2d 1267, 1277 (8th Cir. 1977); *West Virginia ex rel. Garden State Newspapers, Inc. v. Hoke*, 205 W. Va. 611, 620 n.13, 520 S.E.2d 186, 195 n.13 (1999); *Olsson v. Indiana Univ. Bd. of Trustees*, 571 N.E.2d 585, 589 n.4 (Ind. Ct. App. 1991). The Supreme Court of Washington did not question this view in the proceedings below. *See* Pet. App. 19a.

statutory construction, the canon "that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533 (1989); *see also Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Justice Powell sounded a similar note when discussing the standards of liability under Title VI of the Civil Rights Act of 1964:

> [A] majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself. And it would seem that the regulations may be enforced only in a suit pursuant to 42 U.S.C. §1983; anyone invoking the implied right of action under Title VI would be limited by the discriminatory-intent standard required to prove violations of Title VI. Thus, the apparent result is that a suit against *governmental* recipients of federal funds—who may be sued under §1983—will be governed by a different standard of liability than a suit against *private* recipients of federal funds. One would have difficulty explaining this result in terms of the legislative history of Title VI.

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring).[8] Rather than allowing such anomalous results, this Court should conclude that §1983 actions are automatically foreclosed whenever the Court's implied right of action jurisprudence reveals that a conditional funding statute does not create a private cause of action and instead creates an administrative process to enforce compliance.

3. The contractual nature of conditional funding statutes provides still further support for this conclusion. "[W]e have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *Dole*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). The "clear statement" requirement is thus a substantive limitation on Congress's use of the spending power: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17; *see also Suter*, 503 U.S. at 356.

Moreover, the appropriate place for Congress to set forth conditions—especially conditions that implicate federalism concerns—is within the funding statute

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[8] Justice Powell's footnote anticipated this Court's decision in *Sandoval*. On the other hand, a powerful argument can be made that a §1983 suit cannot be brought to enforce the disparate-impact regulations issued under Title VI. *See South Camden Citizens in Action v. New Jersey Dep't of Env. Prot.*, 274 F.3d 771, 790 (3rd Cir. 2001) (§1983 suit may not be maintained to enforce disparate-impact regulations).

itself. *See Will*, 491 U.S. at 65 ("if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear *in the language of the statute*." (emphasis added) (internal quotations and citation omitted)). It cannot be said that §1983's language itself provides the requisite clear statement. Although §1983 expressly authorizes suits to enforce federally secured rights, the statute does not place prospective fund recipients on notice, through unambiguous terms, that it applies to any particular conditional funding statute. *Cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-46 (1985) (discussing level of specificity needed to abrogate or extract waiver of States' Eleventh Amendment immunity).

Where Congress has not created a private cause of action to enforce a conditional funding statute, but has established an administrative remedial scheme, the logical inference to be drawn by parties to the agreement is that the methods for policing compliance with funding conditions will be limited to the administrative scheme. To return to a past example, one doubts that Pennsylvania State University accepted federal funds with the expectation that it, but not the University of Pennsylvania, would be subjected to private actions to enforce FERPA. A clear statement by Congress that the §1983 remedy applies would, of course, meet this concern. But absent such a statement, it belies reality to suggest that a public recipient of federal funds has agreed to private FERPA enforcement actions or had adequate notice that it might be subjected to such actions.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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